2011 DRAFTING REQUEST

Bill

Received: **12/22/2011**

Received By: **phurley**

Wanted: **As time permits**

Companion to LRB:

For: **Glenn Grothman (608) 266-7513**

By/Representing: **himself**

May Contact:

Subject: **Courts - torts**

Drafter: **tkuczens**

Addl. Drafters:

Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Grothman@legis.wisconsin.gov**

Carbon copy (CC:) to: **tracy.kuczenski@legis.wisconsin.gov**

Pre Topic:

No specific pre topic given

Topic:

Changes to product liability provisions governing manufacturers, distributors, sellers and promoters of products

Instructions:

See attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	tkuczens 12/27/2011						
/1	tkuczens 01/05/2012	mduchek 12/29/2011 jdyer 01/05/2012	lparisi 12/29/2011		lparisi 12/29/2011		
/2	tkuczens 01/08/2012	jdyer 01/09/2012	jmurphy 01/05/2012		mbarman 01/05/2012	ggodwin 01/05/2012	

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/3			jfrantze 01/09/2012	_____ _____	sbasford 01/09/2012	sbasford 01/09/2012	

FE Sent For:

<END>

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/?	tkuczens 12/27/2011	1/3/9 jld	1/9	1/9			
/1	tkuczens 01/05/2012	mduchek 12/29/2011 jdyer 01/05/2012	lparisi 12/29/2011		lparisi 12/29/2011		
/2			jmurphy 01/05/2012		mbarman 01/05/2012	ggodwin 01/05/2012	

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required

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/?	tkuczens 12/27/2011	2/5 jld	1/5/12	1/5			
/1		mduchek 12/29/2011	lparisi 12/29/2011	_____ _____	lparisi 12/29/2011		

FE Sent For:

<END>

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Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	tkuczens						

12/29/11

FE Sent For:

11

<END>

Tracy,

Sen. Grothman dropped off these materials. He'd like a draft that incorporates the memo and 11a1850/3. (that may = the same thing) He would like it "soon."

thanks!

P

Tnx look at 11a1850 soon

WISCONSIN 2011 ACT 2 FELL SHORT OF CLEARLY RESTORING TRADITIONAL WISCONSIN LAW FOR ALL MANUFACTURERS

INTRODUCTION AND SUMMARY

When Governor Walker authorized the 2011 January Special Session, he stated: "Improving Wisconsin's litigation climate is vital to reviving our economy. This important part of our special session legislation sends a message directly to job creators that Wisconsin is open for business." Central to the Governor's proposals was a limitation on the "risk contribution" exception to the traditional product identification requirement, which had been greatly expanded by Supreme Court's *Thomas* decision. On January 18, the Milwaukee Journal Sentinel supported the Governor: "One new rule would require a plaintiff in a lawsuit to prove that a manufacturer actually made the product that harmed him or her. The change would correct an anomaly cemented in place by a state Supreme Court decision allowing a boy poisoned by lead paint to sue paint manufacturers even though he couldn't prove any of them made the paint that harmed him."

Through 2011 Wisconsin Act 2, the legislature earlier this year sought to restore to Wisconsin law the traditional requirement of manufacturer product identification. Since enactment of Act 2, however, plaintiff lawyers have been seeking to gut the legislature's intention by arguing that the Supreme Court's *Thomas* decision should be applied retroactively to all lawsuits where harms occurred before enactment of Act 2. Plaintiff lawyers threaten to seek to continue to apply the "risk contribution" exception to a broad array of product manufacturers for years to come.

The proposed amendment to Act 2 here does not impose any retroactive requirements. Instead, it restores for all lawsuits against all manufacturers traditional Wisconsin law. It assures that the Governor's intentions, as supported by the Journal Sentinel, are not thwarted.

THE TRADITIONAL LAW IN WISCONSIN

A fundamental tenet of U.S. tort law is that a defendant may be held liable only for harm the defendant causes, not for harm caused by others. Traditionally, in Wisconsin, when a product is alleged to have caused harm, the plaintiff must prove that the manufacturer made the product that caused the harm. It is not sufficient to show that the manufacturer made a product similar to the one that caused the harm.

Wisconsin's Supreme Court judicially created an exception to the requirement that the manufacturer be identified by establishing the "risk contribution" theory in1984 in the *Collins* case, involving the chemically unique medicine DES given to pregnant women. The *Collins* decision was unusual; only a handful of other states have allowed such an exception to the identification requirement, even for DES cases.

In 2005, the Court greatly expanded the "risk contribution" exception to product identification in the *Thomas* decision by applying it to the raw material white lead carbonates, common pigments used for many purposes prior to 1978, including house paints. This expansion was unprecedented. In no other state are lawsuits against former manufacturers of white lead carbonates allowed without specific product identification. *Thomas* opened the door for use of the "risk contribution" exception for a broad array of ingredients and products – from metals in pots and pans, to grains in bread and rolls, to drills and hammers. A doctrine that was created to address unique circumstances (DES) was greatly expanded to permit its application to many types of product and raw material manufacturers.

Not surprisingly, all manufacturers (throughout the nation) became concerned that they could be held liable in Wisconsin many decades later merely because they also sold similar products. Like the Governor and the Journal Sentinel, all manufacturers supported enactment of Wisconsin Act 2 to restore Wisconsin's traditional requirement of product identification.

WISCONSIN ACT 2 ATTEMPTED TO RESTORE THE TRADITIONAL LAW OF WISCONSIN FOR ALL MANUFACTURERS

The legislature enacted 2011 Wisconsin Act 2 earlier this year to reaffirm its commitment to the traditional product liability law requirements for plaintiffs to prove product identification and causation. The Act limits the "risk contribution" theory to the exceptional circumstances of the DES cases discussed in *Collins,* 116 Wis.2d 166, 342 N.W.2d 37 (1894). The Act intended to overrule the Supreme Court's decision in *Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005), which greatly expanded the potential applicability of the "risk contribution" theory.

Since Act 2 became law, plaintiff lawyers have contended that it does not apply to their lawsuits against former lead pigment manufacturers. Just before the Act's effective date, plaintiff lawyers filed "risk contribution" claims for 164 plaintiffs against former lead pigment manufacturers. Since the effective date, they have filed other lead pigment lawsuits. Plaintiff lawyers contend that Act 2 does not apply to the pre-enactment lawsuits because of their filing date and that the post-enactment suits are not covered because the plaintiffs' exposures to lead occurred prior to enactment.

Similar arguments can be expected in all cases against manufacturers that seek to avoid having to prove product identification. Plaintiffs will file lawsuits alleging they fall within the "risk contribution" exception whenever they claim the harm occurred before Act 2 became effective. Such lawsuits could be filed for decades against a broad array of manufacturers.

We believe that the legislature intended to make it clear that Wisconsin law has always required proof of product identification and causation of injury for all products; that the risk-contribution theory is limited to the unique circumstances set forth in *Collins*; and that the *Thomas* decision was incorrect and should not apply to any lawsuit

filed at any time. Without express legislative language, plaintiff lawyers will continue to disregard those legislative intentions and impose meritless litigation on the judicial system, already strapped with limited resources, and to attempt to impose limitless liability upon many manufacturers.

Act 2 announced the legislature's intention to remedy this danger and eliminate the State as the only jurisdiction in the nation to have such an expansive "risk contribution" doctrine. However, without the proposed amendment of Act 2, trial lawyers will continue to attempt to exploit what they assert is a loophole in Act 2 to attack Wisconsin's business community for years to come.

THE SOLUTION

The attached proposed amendments to Act 2 explain in a preamble (**Section 30**) that the legislature intended that the "risk contribution" theory should at all times in all lawsuits be limited to the circumstances of *Collins*. This preamble provides the clear direction to Wisconsin courts on legislative intent and public policy rationale that will answer plaintiff lawyer contentions. **Section 29** amends Act 2 to clarify that the limitations on the "risk contribution" theory apply to all lawsuits alleging any theory of law, not just strict liability claims. **Section 45** says that the limitations on the "risk contribution" theory apply to all lawsuits whenever filed.

The proposed amendment to Act 2 does not seek any retroactive alteration of plaintiff rights; instead, it seeks to restore traditional Wisconsin legal doctrines to all lawsuits whenever they accrued. It is plaintiff lawyers who are seeking through their interpretation of Act 2 retroactive application of the *Thomas* decision that Act 2 intended to declare was never the law of Wisconsin.

In order to achieve the goal of Act 2, it is critical that the legislature provide reviewing courts with an explanation of the legislature's intent and purpose. The Wisconsin legislature has previously enacted, and Wisconsin courts have upheld as constitutional, statutes that applied procedural or substantive changes to cases filed and/or rights which accrue prior to the effective date of legislation. For such an application, Wisconsin courts require that the statute have a rational legislative purpose, intended to remedy a general economic or social issue, and this purpose must be expressed in legislative findings or statement of purpose. As was done in providing legislative findings in 2007 Wisconsin Act 226, section 10; 2009 Wisconsin Act 28, sections 3218 and 9156(1d); and 2009 Assembly Bill 56, section 2, this proposed amendment provides reviewing courts with the statement of the rational legislative basis with which to uphold the constitutionality of this amendment to Act 2.

Act 2 also was intended to confirm in Wisconsin product liability law other basic principles. **Section 31** clarifies that future product liability claims in Wisconsin cannot impose liability on manufacturers of raw materials (like lead pigments) unless the raw material itself is defective. It also clarifies that raw material manufacturers do not have a duty to warn the ultimate consumer with whom they have no contact. It applies the

common sense, accepted rules that a raw material supplier is not liable if its product is misused, not maintained, or sold to a sophisticated user already aware of the product's risks.

CONCLUSION

In 2005, the Wisconsin Supreme Court radically expanded the application of "risk contribution" to manufacturers of white carbonate lead pigments. Wisconsin businesses have suffered under the specter of the application of the "risk contribution" theory to their industries. Act 2 sought to limit the "risk contribution" theory to create a legal environment for Wisconsin businesses that is consistent, uniform and predictable. Unless these changes are made applicable to all lawsuits, Act 2 will be thwarted.

The Act's application to new cases ensured a "rush to the courthouse" by plaintiffs' lawyers, who filed hundreds of new claims under the current *Thomas* framework prior to the Act's effective date. Further, plaintiff lawyers claim that the reforms do not apply to injuries caused prior to the bill's effective date, regardless of when filed.

Businesses should not have to wait for years for tort reform changes to improve the business climate of Wisconsin. When the business community, political and civil leaders all agree that the Supreme Court in *Thomas* misapplied the "risk contribution" theory, such reforms should impact not only prospective cases, but those cases currently pending, so that bad law does not continue to be applied by Wisconsin courts for years to come.

State of Wisconsin
2011 - 2012 LEGISLATURE

LRB-3693/P1
TKK:...

RMNR insert

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

12/27/11 Wanted as soon as possible (1/3 or 1/4 ?) or 12/30 ? jld/kjf/med

AN ACT Gen ...; **relating to:** changes to product liability law and the law governing remedies against manufacturers, distributors, sellers, and promoters of a product.

Analysis by the Legislative Reference Bureau

2011 Wisconsin Act 2 (Act 2) made a number of changes to the law governing civil actions involving product liability and civil actions against manufacturers, distributors, sellers, and promoters of products. This bill makes several changes to certain provisions enacted under Act 2.

PRODUCT LIABILITY

CONTRIBUTORY NEGLIGENCE

Under Act 2, in product liability actions in which a person injured by a defective product is seeking damages from the manufacturer, distributor, or seller of the product based on a theory of strict liability, the fact finder must first determine what percentage of the causal responsibility for the injury is due to the defective product, what percentage is due to the contributory negligence of the injured party, and what percentage is due to the contributory negligence of any third person. If the injured party's percentage of causal responsibility exceeds the percentage responsibility resulting from the defective condition of the product, the injured party may not recover any damages from the manufacturer, distributor, or seller of the product. If the injured party is entitled to recover damages, the injured party's damages are to be reduced by the injured party's percentage of causal responsibility for the injury, if any.

This bill specifies that the role of the fact finder in determining the causal responsibility for the injury is not limited to product liability actions based on a theory of strict liability, but instead extends to all product liability actions in which a party injured by a defective product seeks damages.

DEFENSES

Act 2 established several defenses for a defendant manufacturer, seller, or distributor of a product to raise in a product liability action. For example, under Act 2, if the defendant can prove that, at the time of injury, the claimant was under the influence of a drug or an intoxicant, a rebuttable presumption is established that the claimant's intoxication or drug use was the cause of the injury. Other defenses under current law may result in dismissal of the action, a finding that the product was not defective, or a reduction in the amount of damages an injured person may recover.

This bill creates three new defenses: 1) a manufacturer of a product, product component, product ingredient, or raw material is not liable for injuries caused by a finished product if the product, product component, product ingredient, or raw material was not defective and unreasonably dangerous when it left the manufacturer's possession; 2) in claims involving negligence, strict liability, or breach of warranty, a manufacturer, seller, distributor, or promoter of a product component, product ingredient, or raw material incorporated into a finished product has no duty to warn the ultimate purchaser of risks of the finished product; and 3) a manufacturer, seller, distributor, or promoter of a product is not liable for damages if the product was sold or distributed to a sophisticated user of the product who is or should be aware of the risks associated with the use of the product and how to safely use the product.

REMEDIES AGAINST MANUFACTURERS, DISTRIBUTORS, SELLERS, AND PROMOTERS OF A PRODUCT

Under Act 2, a manufacturer, distributor, seller, or promoter of a product who is a defendant in a civil action generally may be held liable for damages only if an injured party proves, in addition to causation, damages, and other elements of the claim, that the specific product that caused the injury was manufactured, distributed, sold, or promoted by the defendant. Also under Act 2, in cases in which an injured party cannot prove that the defendant manufactured, distributed, sold or promoted the specific product that caused the injury, the defendant may be held liable if: 1) the injured party names as defendants in the action those manufacturers who, collectively, during the relevant production period, manufactured at least 80 percent of all products sold in this state that are chemically identical to the specific product that allegedly caused the claimant's injury and 2) the injured person proves certain other elements related to the cause of the injury and the right of the injured person to a recovery. These provisions of Act 2 were made applicable to actions or special proceedings commenced on the effective date of the Act.

This bill provides that the provisions of Act 2 governing remedies against manufacturers, distributors, sellers, and promoters of a product apply to all actions in law or equity whenever filed or accrued. The bill includes a statement of legislative findings and intent which states, in part, that the portions of Act 2 governing remedies against manufacturers, distributors, sellers, and promoters of

Insert 3 - top

a product were enacted in response to the Wisconsin Supreme Court's decision in *Thomas v. Mallett*, 2005 WI 129. The bill also explicitly abrogates common law doctrines governing product liability claims that conflict with the elements, requirements, and defenses established under Act 2.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. Initial applicability.

(END)

Insert 3-2

State of Wisconsin
2011 – 2012 LEGISLATURE

September 2011 Special Session

LRBa1850/3
TKK:jld&kjf:rs

ASSEMBLY AMENDMENT ,
TO ASSEMBLY SUBSTITUTE AMENDMENT 1,
TO ASSEMBLY BILL 14

At the locations indicated, amend the substitute amendment as follows:

1. Page 1, line 2: after "actions" insert "and making changes to product liability law".

2. Page 2, line 14: after that line insert:

Begin Insert 3 - top

SECTION ~~1~~. 895.045 (3) (a) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.045 **(3)** (a) In an action by any person to recover damages for injuries caused by a defective product ~~based on a claim of strict liability~~, the fact finder shall first determine if the injured party has the right to recover damages. To do so, the fact finder shall determine what percentage of the total causal responsibility for the injury resulted from the contributory negligence of the injured person, what

percentage resulted from the defective condition of the product, and what percentage resulted from the contributory negligence of any other person.

SECTION 4f. 895.045 (3) (f) of the statutes, as created by 2011 Wisconsin Act 2, is repealed.

SECTION 4g. 895.046 (1) of the statutes, as created by 2011 Wisconsin Act 2, is renumbered 895.046 (1r).

SECTION 4h. 895.046 (1g) of the statutes is created to read:

895.046 **(1g)** LEGISLATIVE FINDINGS AND INTENT. The legislature finds that it is in the public interest to clarify product liability law, generally, and the application of the risk contribution theory of liability first announced by the Wisconsin Supreme Court in *Collins v. Eli Lilly Company*, 116 Wis. 2d 166 (1984), specifically, in order to return tort law to its historical, common law roots. This return both protects the rights of citizens to pursue legitimate and timely claims of injury resulting from defective products, and assures that businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago. The legislature finds that the application of risk contribution to former white lead carbonate manufacturers in *Thomas v. Mallet*, 285 Wis. 2d 236 (2005), was an improperly expansive application of the risk contribution theory of liability announced in Collins, and that application raised substantial questions of deprivation of due process, equal protection, and right to jury trial under the federal and Wisconsin constitutions. The legislature finds that this section protects the right to a remedy found in article I, section 9, of the Wisconsin Constitution, by preserving the narrow and limited application of the risk contribution theory of liability announced in *Collins*.

SECTION 1. 895.046 (2) of the statutes, as created by 2011 Wisconsin Act 32, is amended to read:

895.046 **(2)** APPLICABILITY. This section applies to all actions in law or equity, whenever filed or accrued, in which a claimant alleges that the manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property, including actions based on allegations that the design, manufacture, distribution, sale, or promotion of, or instructions or warnings about, a product caused or contributed to a personal injury or harm to a person or property, a private nuisance, or a public nuisance, and to all related or independent claims, including unjust enrichment, restitution, or indemnification.

SECTION 2. 895.046 (8) of the statutes is created to read:

895.046 **(8)** ABROGATION OF COMMON LAW. This section establishes the elements of and requirements for causation and product identification in and defenses for product liability claims in this state, and supersedes common law doctrines that conflict with the elements, requirements, and defenses established in this section. Except as provided in this subsection, this section does not alter the other elements required to establish a product liability claim or a claim for misrepresentation or breach of warranty under common law.

SECTION 3. 895.047 (3) (f) of the statutes is created to read:

895.047 **(3)** (f) A manufacturer of a product, product component, product ingredient, or raw material is not liable for injuries caused by a finished product if the product, product component, product ingredient, or raw material was not defective and unreasonably dangerous when it left the manufacturer's possession, including circumstances in which a cause of a claimant's injuries was a person's

failure to adequately maintain the finished product or use of the finished product in a manner that was not an intended use of the finished product.

SECTION ~~15~~. 895.047 (3) (g) of the statutes is created to read:

895.047 **(3)** (g) A manufacturer, seller, distributor, or promoter of a product component or product ingredient and a seller, distributor, or promoter of a raw material supplied to a manufacturer of a finished product have no duty in claims involving negligence, strict liability, or breach of warranty to warn the ultimate purchaser or user of a finished product of any risks or characteristics of the finished product.

SECTION ~~16~~. 895.047 (3) (h) of the statutes is created to read:

895.047 **(3)** (h) A manufacturer, seller, distributor, or promoter of a product is not liable to a claimant for damages if the product was sold or distributed to a sophisticated user of the product who is either aware or should be aware of the risks associated with the use of the product and how to safely use the product.

SECTION ~~17~~. 895.047 (6) of the statutes, as created by 2011 Wisconsin Act 2, is repealed.

End Insert 3-19

3. Page 2, line 16: delete "This act" and substitute "INTEREST ON JUDGMENTS. The treatment of sections 807.01 (4), 814.04 (4), and 815.05 (8) of the statutes".

4. Page 2, line 17: after that line insert:

Begin Insert 3-2

(1) "(2c) CIVIL ACTIONS. The treatment of sections 895.045 (3) (a) and (f), 895.046 (1), (1g), (2), and (8), and 895.047 (3) (f), (g), and (h) and (6) of the statutes first applies to actions or special proceedings pending or commenced on the effective date of this subsection.".

(END)

Kuczenski, Tracy

From: Burri, Lance
Sent: Tuesday, January 03, 2012 5:09 PM
To: Kuczenski, Tracy
Subject: Bill draft

Attachments: WI Revised Bill - ANNOTATED.pdf LRB - 3693

Tracy, here is a mockup of what we'd like to draft. It pulls a number of things out of the bill we had drafted last week.

WI Revised Bill - ANNOTATED.pd...

I'm afraid I need this ASAP. Can you give me a time estimate?

Lance Burri
Office of Sen. Glenn Grothman
608-266-7513

Remove §7, 8 & 9

2011 BILL

AN ACT *to repeal* 895.045 (3) (f) and 895.047 (6); *to renumber* 895.046 (1); *to amend* 895.045 (3) (a) and 895.046 (2); and *to create* 895.046 (1g) and 895.046 (8) of the statutes; **relating to:** changes to product liability law and the law governing remedies against manufacturers, distributors, sellers, and promoters of a product.

Analysis by the Legislative Reference Bureau

2011 Wisconsin Act 2 (Act 2) made a number of changes to the law governing civil actions involving product liability and civil actions against manufacturers, distributors, sellers, and promoters of products. This bill makes several changes to certain provisions enacted under Act 2.

PRODUCT LIABILITY

CONTRIBUTORY NEGLIGENCE

Under Act 2, in product liability actions in which a person injured by a defective product is seeking damages from the manufacturer, distributor, or seller of the product based on a theory of strict liability, the fact finder must first determine what percentage of the causal responsibility for the injury is due to the defective product, what percentage is due to the contributory negligence of the injured party, and what percentage is due to the contributory negligence of any third person. If the injured party's percentage of causal responsibility exceeds the percentage responsibility resulting from the defective condition of the product, the injured party may not recover any damages from the manufacturer, distributor, or seller of the product. If the injured party is entitled to recover damages, the

injured party's damages are to be reduced by the injured party's percentage of causal responsibility for the injury, if any.

This bill specifies that the role of the fact finder in determining the causal responsibility for the injury is not limited to product liability actions based on a theory of strict liability, but instead extends to all product liability actions in which a party injured by a defective product seeks damages.

DEFENSES

Act 2 established several defenses for a defendant manufacturer, seller, or distributor of a product to raise in a product liability action. For example, under Act 2, if the defendant can prove that, at the time of injury, the claimant was under the influence of a drug or an intoxicant, a rebuttable presumption is established that the claimant's intoxication or drug use was the cause of the injury. Other defenses under Act 2 may result in dismissal of the action, a finding that the product was not defective, or a reduction in the amount of damages an injured party may recover.

This bill specifies that the applicability of these defenses is not limited to product liability actions based on a theory of strict liability, but instead extends to all product liability actions in which a party injured by a defective product seeks damages.

REMEDIES AGAINST MANUFACTURERS, DISTRIBUTORS, SELLERS, AND PROMOTERS OF A PRODUCT

Under Act 2, a manufacturer, distributor, seller, or promoter of a product who is a defendant in a civil action generally may be held liable for damages only if an injured party proves, in addition to causation, damages, and other elements of the claim, that the specific product that caused the injury was manufactured, distributed, sold, or promoted by the defendant. Also under Act 2, in cases in which an injured party cannot prove that the defendant manufactured, distributed, sold or promoted the specific product that caused the injury, the defendant may be held liable if: 1) the injured party names as defendants in the action those manufacturers who, collectively, during the relevant production period, manufactured at least 80 percent of all products sold in this state that are chemically identical to the specific product that allegedly caused the claimant's injury and 2) the injured party proves certain other elements related to the cause of the injury and the right of the injured party to a recovery. These provisions of Act 2 were made applicable to actions or special proceedings commenced on or after the effective date of the Act.

This bill provides that the provisions of Act 2 governing remedies against manufacturers, distributors, sellers, and promoters of a product apply to all actions in law or equity, whenever filed or accrued. The bill includes a statement of legislative findings and intent which states, in part, that the portions of Act 2 governing remedies against manufacturers, distributors, sellers, and promoters of a product were enacted in response to the Wisconsin Supreme Court's decision in *Thomas v. Mallett*, 2005 WI 129. The bill also explicitly abrogates common law doctrines governing product liability claims that conflict with the elements, requirements, and defenses established under Act 2.

The people of the state of Wisconsin, represented in senate and assembly. do enact as follows:

SECTION 1. 895.045 (3) (a) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.045 **(3)** (a) In an action by any person to recover damages for injuries caused by a defective product ~~based on a claim of strict liability~~, the fact finder shall first determine if the injured party has the right to recover damages. To do so, the fact finder shall determine what percentage of the total causal responsibility for the injury resulted from the contributory negligence of the injured person, what percentage resulted from the defective condition of the product, and what percentage resulted from the contributory negligence of any other person.

SECTION 2. 895.045 (3) (f) of the statutes, as created by 2011 Wisconsin Act 2, is repealed.

Sections 1 and 2 alter the limited reach of Act 2's contributory negligence defenses found at 895.045(3) by permitting their application to all manner of product liability causes of actions, including negligence or breach of warranty. Were these defenses to have the limited application as currently expressed in Act 2, defendants would be unable to utilize the commonly-accepted limitations on liability of contributory negligence and causal responsibility against any product liability actions other than claims based on strict liability. A consequence of this limited application would be to allow plaintiffs' attorneys to circumvent these defenses by promulgating various theories of liability under the *Thomas* "risk contribution" framework, to the ultimate detriment of the Wisconsin business community. These sections reduce that ability by permitting their uniform application, where appropriate, across all actions.

SECTION 3. 895.046 (1) of the statutes, as created by 2011 Wisconsin Act 2, is renumbered 895.046 (1r).

SECTION 4. 895.046 (lg) of the statutes is created to read:

895.046 **(lg)** LEGISLATIVE FINDINGS AND INTENT. The legislature finds that it is in the public interest to clarify product liability law, generally, and the application of the

risk contribution theory of liability first announced by the Wisconsin Supreme Court in *Collins v. Eli Lilly Company*, 116 Wis. 2d 166 (1984), specifically, in order to return tort law to its historical, common law roots. This return both protects the rights of citizens to pursue legitimate and timely claims of injury resulting from defective products, and assures that businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago. The legislature finds that the application of risk contribution to former white lead carbonate manufacturers in *Thomas v. Mallet*, 285 Wis. 2d 236 (2005), was an improperly expansive application of the risk contribution theory of liability announced in *Collins*, and that application raised substantial questions of deprivation of due process, equal protection, and right to jury trial under the federal and Wisconsin constitutions. The legislature finds that this section protects the right to a remedy found in article I, section 9, of the Wisconsin Constitution, by preserving the narrow and limited application of the risk contribution theory of liability announced in *Collins*.

In order to achieve the goal of Act 2, it is critical that the legislature provide reviewing courts with an explanation of the legislature's intent and purpose. The Wisconsin legislature has previously enacted, and Wisconsin courts have upheld as constitutional, statutes that applied procedural or substantive changes to cases filed and/or rights which accrue prior to the effective date of legislation. For such an application, Wisconsin courts require that the statute have a rational legislative purpose, intended to remedy a general economic or social issue, and that this purpose be expressed in legislative findings or statement of purpose. This section thus explains the legislature's purpose and intent in restoring Wisconsin tort law to its "historical, common law roots," and "assur[ing] that businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products" made long ago that the company may have never even manufactured.

SECTION 5. 895.046 (2) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.046 **(2)** APPLICABILITY. This section applies to all actions in law or equity, whenever filed or accrued, in which a claimant alleges that the manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property, including actions based on allegations that the design, manufacture, distribution, sale, or promotion of, or instructions or warnings about, a product caused or contributed to a personal injury or harm to a person or property, a private nuisance, or a public nuisance, and to all related or independent claims, including unjust enrichment, restitution, or indemnification.

Act 2 sought to sought to restore to Wisconsin law the traditional common law requirements that in product liability actions, plaintiffs be required to prove both product identification and causation. In so doing, the legislature sought to level the playing field for Wisconsin manufacturers from the most expansive theory of liability found in any state in the Union to traditional, accepted tort law principles. Because Act 2's changes apply only prospectively, the purposes of Act 2 will be thwarted unless these changes are made applicable to all lawsuits. The Act's application to new cases ignited a "rush to the courthouse" by plaintiffs' lawyers, who claimed that Act 2 does not apply to claimants exposed to products before Act 2's enactment, even when a lawsuit is filed after Act 2's effective date. The law should apply to all parties to product liability claims, including Wisconsin manufacturers, in a uniform, consistent and predictable manner. Absent this change, Wisconsin courts could continue to apply *Thomas'* "risk contribution" theory to Wisconsin manufacturers for years or even decades to come.

SECTION **6.** 895.046 (8) of the statutes is created to read:

895.046 **(8)** ABROGATION OF COMMON LAW. This section establishes the elements of and requirements for causation and product identification in and defenses for product liability claims in this state, and supersedes common law doctrines that conflict with the elements, requirements, and defenses established in this section. Except as provided in this subsection, this section does not alter the other elements required to establish a product liability claim or a claim for misrepresentation or breach of warranty under common law.

The Wisconsin Constitution provides for the relationship between the common law and statutory schemes in Article XIV, section 13: "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature." Any statute which replaces Wisconsin common law must expressly state that it does so. The Wisconsin Supreme Court has unequivocally stated: "A statute does not change the common law unless the legislative purpose to do so is clearly expressed in the language of the statute. To accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory." *Strenke v. Hogner*, 694 N.W.2d 296, 302-03 (Wis. 2005).

SECTION 7. 895.047 (6) of the statutes, as created by 2011 Wisconsin Act 2, is repealed.

As with Sections 1 and 2 above, the commonly-accepted defenses enumerated in 895.047(3) should not be limited to claims of strict liability, but rather should have broad applicability to a variety of product liability causes of action. Absent this change, plaintiffs' attorneys will seek to limit the application of these defenses to "risk contribution" cases by claiming multiple theories of liability. This change assures that such defenses may be utilized by Wisconsin manufacturers, and will be applied consistently and uniformly by Wisconsin courts to all manner of product liability claims.

SECTION 8. **Initial applicability.**

(1) The treatment of sections 895.045 (3) (a) and (f), 895.046 (1), (lg), (2), and (8), and 895.047 (6) of the statutes first applies to actions or special proceedings pending or commenced on the effective date of this subsection.

(END)

State of Wisconsin
2011 - 2012 LEGISLATURE

LRB-3693/1 2
TKK:jld/kjf/med:md

insert

2011 BILL

1/5/12 TODAY

LX Regen

AN ACT ***to repeal*** 895.045 (3) (f) and 895.047 (6); ***to renumber*** 895.046 (1); ***to amend*** 895.045 (3) (a) and 895.046 (2); and ***to create*** 895.046 (1g), 895.046 (8), 895.047 (3) (f), 895.047 (3) (g) and 895.047 (3) (h) of the statutes; **relating to:** changes to product liability law and the law governing remedies against manufacturers, distributors, sellers, and promoters of a product.

Analysis by the Legislative Reference Bureau

2011 Wisconsin Act 2 (Act 2) made a number of changes to the law governing civil actions involving product liability and civil actions against manufacturers, distributors, sellers, and promoters of products. This bill makes several changes to certain provisions enacted under Act 2.

claims brought under a theory of strict liability

to ✓

Insert Analysis

PRODUCT LIABILITY

CONTRIBUTORY NEGLIGENCE

Under Act 2, in product liability actions in which a person injured by a defective product is seeking damages from the manufacturer, distributor, or seller of the product based on a theory of strict liability, the fact finder must first determine what percentage of the causal responsibility for the injury is due to the defective product, what percentage is due to the contributory negligence of the injured party, and what percentage is due to the contributory negligence of any third person. If the injured party's percentage of causal responsibility exceeds the percentage responsibility resulting from the defective condition of the product, the injured party may not

recover any damages from the manufacturer, distributor, or seller of the product. If the injured party is entitled to recover damages, the injured party's damages are to be reduced by the injured party's percentage of causal responsibility for the injury, if any.

This bill specifies that the role of the fact finder in determining the causal responsibility for the injury is not limited to product liability actions based on a theory of strict liability, but instead extends to all product liability actions in which a party injured by a defective product seeks damages.

DEFENSES

Act 2 established several defenses for a defendant manufacturer, seller, or distributor of a product to raise in a product liability action. For example, under Act 2, if the defendant can prove that, at the time of injury, the claimant was under the influence of a drug or an intoxicant, a rebuttable presumption is established that the claimant's intoxication or drug use was the cause of the injury. Other defenses under Act 2 may result in dismissal of the action, a finding that the product was not defective, or a reduction in the amount of damages an injured party may recover.

This bill creates three new defenses: 1) a manufacturer of a product, product component, product ingredient, or raw material is not liable for injuries caused by a finished product if the product, product component, product ingredient, or raw material was not defective and unreasonably dangerous when it left the manufacturer's possession; 2) in claims involving negligence, strict liability, or breach of warranty, a manufacturer, seller, distributor, or promoter of a product component, product ingredient, or raw material incorporated into a finished product has no duty to warn the ultimate purchaser of risks of the finished product; and 3) a manufacturer, seller, distributor, or promoter of a product is not liable for damages if the product was sold or distributed to a sophisticated user of the product who is or should be aware of the risks associated with the use of the product and how to safely use the product.

REMEDIES AGAINST MANUFACTURERS, DISTRIBUTORS, SELLERS, AND PROMOTERS OF A PRODUCT

Under Act 2, a manufacturer, distributor, seller, or promoter of a product who is a defendant in a civil action generally may be held liable for damages only if an injured party proves, in addition to causation, damages, and other elements of the claim, that the specific product that caused the injury was manufactured, distributed, sold, or promoted by the defendant. Also under Act 2, in cases in which an injured party cannot prove that the defendant manufactured, distributed, sold or promoted the specific product that caused the injury, the defendant may be held liable if: 1) the injured party names as defendants in the action those manufacturers who, collectively, during the relevant production period, manufactured at least 80 percent of all products sold in this state that are chemically identical to the specific product that allegedly caused the claimant's injury and 2) the injured party proves certain other elements related to the cause of the injury and the right of the injured party to a recovery. These provisions of Act 2 were made applicable to actions or special proceedings commenced on or after the effective date of the Act.

BILL

Under risk contribution theory ✓

This bill provides that the provisions of Act 2 governing remedies against manufacturers, distributors, sellers, and promoters of a product apply to all actions in law or equity, whenever filed or accrued. The bill includes a statement of legislative findings and intent which states, in part, that the portions of Act 2 governing remedies against manufacturers, distributors, sellers, and promoters of a product were enacted in response to the Wisconsin Supreme Court's decision in *Thomas v. Mallett*, 2005 WI 129. The bill also explicitly abrogates common law doctrines governing product liability claims that conflict with the elements, requirements, and defenses established under Act 2.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 895.045 (3) (a) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.045 **(3)** (a) In an action by any person to recover damages for injuries caused by a defective product ~~based on a claim of strict liability,~~ the fact finder shall first determine if the injured party has the right to recover damages. To do so, the fact finder shall determine what percentage of the total causal responsibility for the injury resulted from the contributory negligence of the injured person, what percentage resulted from the defective condition of the product, and what percentage resulted from the contributory negligence of any other person.

SECTION 2. 895.045 (3) (f) of the statutes, as created by 2011 Wisconsin Act 2, is repealed.

SECTION 3. 895.046 (1) of the statutes, as created by 2011 Wisconsin Act 2, is renumbered 895.046 (1r).

SECTION 4. 895.046 (1g) of the statutes is created to read:

895.046 **(1g)** LEGISLATIVE FINDINGS AND INTENT. The legislature finds that it is in the public interest to clarify product liability law, generally, and the application of the risk contribution theory of liability first announced by the Wisconsin Supreme

Court in *Collins v. Eli Lilly Company*, 116 Wis. 2d 166 (1984), specifically, in order to return tort law to its historical, common law roots. This return both protects the rights of citizens to pursue legitimate and timely claims of injury resulting from defective products, and assures that businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago. The legislature finds that the application of risk contribution to former white lead carbonate manufacturers in *Thomas v. Mallet*, 285 Wis. 2d 236 (2005), was an improperly expansive application of the risk contribution theory of liability announced in Collins, and that application raised substantial questions of deprivation of due process, equal protection, and right to jury trial under the federal and Wisconsin constitutions. The legislature finds that this section protects the right to a remedy found in article I, section 9, of the Wisconsin Constitution, by preserving the narrow and limited application of the risk contribution theory of liability announced in *Collins*.

SECTION 5. 895.046 (2) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.046 **(2)** APPLICABILITY. This section applies to all actions in law or equity, whenever filed or accrued, in which a claimant alleges that the manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property, including actions based on allegations that the design, manufacture, distribution, sale, or promotion of, or instructions or warnings about, a product caused or contributed to a personal injury or harm to a person or property, a private nuisance, or a public nuisance, and to all related or independent claims, including unjust enrichment, restitution, or indemnification.

SECTION 6. 895.046 (8) of the statutes is created to read:

895.046 **(8)** ABROGATION OF COMMON LAW. This section establishes the elements of and requirements for causation and product identification in and defenses for product liability claims in this state, and supersedes common law doctrines that conflict with the elements, requirements, and defenses established in this section. Except as provided in this subsection, this section does not alter the other elements required to establish a product liability claim or a claim for misrepresentation or breach of warranty under common law.

SECTION 7. 895.047 (3) (f) of the statutes is created to read:

895.047 **(3)** (f) A manufacturer of a product, product component, product ingredient, or raw material is not liable for injuries caused by a finished product if the product, product component, product ingredient, or raw material was not defective and unreasonably dangerous when it left the manufacturer's possession, including circumstances in which a cause of a claimant's injuries was a person's failure to adequately maintain the finished product or use of the finished product in a manner that was not an intended use of the finished product.

SECTION 8. 895.047 (3) (g) of the statutes is created to read:

895.047 **(3)** (g) A manufacturer, seller, distributor, or promoter of a product component or product ingredient and a seller, distributor, or promoter of a raw material supplied to a manufacturer of a finished product have no duty in claims involving negligence, strict liability, or breach of warranty to warn the ultimate purchaser or user of a finished product of any risks or characteristics of the finished product.

SECTION 9. 895.047 (3) (h) of the statutes is created to read:

Insert 6-5

895.047 **(3)** (h) A manufacturer, seller, distributor, or promoter of a product is not liable to a claimant for damages if the product was sold or distributed to a sophisticated user of the product who is either aware or should be aware of the risks associated with the use of the product ~~and how to safely use the product~~.

SECTION 10. 895.047 (6) of the statutes, as created by 2011 Wisconsin Act 2, is repealed.

SECTION 11. Initial applicability.

(1) The treatment of sections 895.045 (3) (a) and (f), 895.046 (1), (1g), (2), and (8), and 895.047 (3) (f), (g), and (h) and (6) of the statutes first applies to actions or special proceedings pending or commenced on the effective date of this subsection.

(END)

Insert analysis

REQUIREMENTS FOR BRINGING A PRODUCT LIABILITY ACTION BASED ON A DEFECTIVE PRODUCT; DEFENSES AND EXCEPTIONS TO LIABILITY

Act 2 created specific requirements for bringing a product liability action seeking damages under the theory of strict liability against manufacturers of the product and against sellers and distributors of the product. Act 2 included defenses and exceptions to strict liability for these types of parties. This bill provides that the requirements established under Act 2 for bringing a product liability action seeking damages, and the defenses and exceptions to liability, apply not only to product liability actions brought under a theory of strict liability but instead extend to all product liability actions in which a party injured by a defective product seeks damages.

Insert 6-5

SECTION 1. 895.047 (1) (intro.) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.047 **(1)** LIABILITY OF MANUFACTURER. (intro.) In an action for damages caused by a manufactured product ~~based on a claim of strict liability~~, a manufacturer is liable to a claimant if the claimant establishes all of the following by a preponderance of the evidence:

History: 2011 a. 2.

SECTION 2. 895.047 (2) (a) (intro.) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.047 **(2)** (a) (intro.) A seller or distributor of a product is not liable ~~based on a claim of strict liability~~ to a claimant unless the manufacturer would be liable under sub. (1) and any of the following applies:

History: 2011 a. 2.

SECTION 3. 895.047 (4) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.047 **(4)** SUBSEQUENT REMEDIAL MEASURES. In an action for damages caused by a manufactured product ~~based on a claim of strict liability,~~ evidence of remedial measures taken subsequent to the sale of the product is not admissible for the purpose of showing a manufacturing defect in the product, a defect in the design of the product, or a need for a warning or instruction. This subsection does not prohibit the admission of such evidence to show a reasonable alternative design that existed at the time when the product was sold.

History: 2011 a. 2.

(end ins 6-5)

Godwin, Gigi

From: Burri, Lance
Sent: Thursday, January 05, 2012 4:37 PM
To: LRB.Legal
Subject: Draft Review: LRB 11-3693/2 Topic: Changes to product liability provisions governing manufacturers, distributors, sellers and promoters of products

Please Jacket LRB 11-3693/2 for the SENATE.

First instruction read from Sen. Grothman on 1/4/12 JEK

2011 BILL

AN ACT ***to repeal*** 895.045 (3) (f) and 895.047 (6); ***to renumber*** 895.046 (1); ***to amend*** 895.045 (3) (a)~~,~~ **and** 895.046 (2)~~, 895.047 (1) (intro.), 895.047 (2) (a) (intro.) and 895.047 (4)~~; and ***to create*** 895.046 (1g) and 895.046 (8) of the statutes; **relating to**: changes to product liability law and the law governing remedies against manufacturers, distributors, sellers, and promoters of a product.

Analysis by the Legislative Reference Bureau

2011 Wisconsin Act 2 (Act 2) made a number of changes to the law governing civil actions involving product liability claims ~~brought under a theory of strict liability~~ and to civil actions against manufacturers, distributors, sellers, and promoters of products. This bill makes several changes to certain provisions enacted under Act 2.

PRODUCT LIABILITY

REQUIREMENTS FOR BRINGING A PRODUCT LIABILITY ACTION BASED ON A DEFECTIVE PRODUCT; DEFENSES AND EXCEPTIONS TO LIABILITY

Act 2 created specific requirements for bringing a product liability action seeking damages under the theory of strict liability against manufacturers of the product and against sellers and distributors of the product. Act 2 included defenses and exceptions to strict liability for these types of parties. This bill provides that the **defenses and time limit** ~~requirements~~ established under Act 2 for bringing a product liability action seeking damages~~, and the defenses and exceptions to liability,~~ apply not only to product liability actions brought under a theory of strict liability but instead extend to all product liability actions in which a party injured by a defective product seeks damages.

CONTRIBUTORY NEGLIGENCE

Under Act 2, in product liability actions in which a person injured by a defective product is seeking damages from the manufacturer, distributor, or seller of the product based on a theory of strict liability, the fact finder must first determine what percentage of the causal responsibility for the injury is due to the defective product, what percentage is due to the contributory negligence of the injured party, and what percentage is due to the contributory negligence of any third person. If the injured party's percentage of causal responsibility exceeds the percentage responsibility resulting from the defective condition of the product, the injured party may not recover any damages from the manufacturer, distributor, or seller of the product. If the injured party is entitled to recover damages, the injured party's damages are to be reduced by the injured party's percentage of causal responsibility for the injury, if any.

This bill specifies that the role of the fact finder in determining the causal responsibility for the injury is not limited to product liability actions based on a theory of strict liability, but instead extends to all product liability actions in which a party injured by a defective product seeks damages.

RISK CONTRIBUTION THEORY: REMEDIES AGAINST MANUFACTURERS, DISTRIBUTORS, SELLERS, AND PROMOTERS OF A PRODUCT

Under Act 2, a manufacturer, distributor, seller, or promoter of a product who is a defendant in a civil action generally may be held liable for damages only if an injured party proves, in addition to causation, damages, and other elements of the claim, that the specific product that caused the injury was manufactured, distributed, sold, or promoted by the defendant. Also under Act 2, in cases in which an injured party cannot prove that the defendant manufactured, distributed, sold or promoted the specific product that caused the injury, the defendant may be held liable under risk contribution theory if: 1) the injured party names as defendants in the action those manufacturers who, collectively, during the relevant production period, manufactured at least 80 percent of all products sold in this state that are chemically identical to the specific product that allegedly caused the claimant's injury and 2) the injured party proves certain other elements related to the cause of the injury and the right of the injured party to a recovery. These provisions of Act 2 were made applicable to actions or special proceedings commenced on or after the effective date of the Act.

This bill provides that the provisions of Act 2 governing remedies against manufacturers, distributors, sellers, and promoters of a product apply to all actions in law or equity, whenever filed or accrued. The bill includes a statement of legislative findings and intent which states, in part, that the portions of Act 2 governing remedies against manufacturers, distributors, sellers, and promoters of a product under risk contribution theory were enacted in response to the Wisconsin Supreme Court's decision in *Thomas v. Mallett*, 2005 WI 129. The bill also explicitly abrogates common law doctrines governing product liability claims that conflict with the elements, requirements, and defenses established under Act 2.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 895.045 (3) (a) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.045 **(3)** (a) In an action by any person to recover damages for injuries caused by a defective product ~~based on a claim of strict liability~~, the fact finder shall first determine if the injured party has the right to recover damages. To do ~~so, the~~ fact finder shall determine what percentage of the total causal responsibility for the injury resulted from the contributory negligence of the injured person, what percentage resulted from the defective condition of the product, and what percentage resulted from the contributory negligence of any other person.

SECTION 2. 895.045 (3) (f) of the statutes, as created by 2011 Wisconsin Act 2, is repealed.

SECTION 3. 895.046 (1) of the statutes, as created by 2011 Wisconsin Act 2, is renumbered 895.046 (1r).

SECTION 4. 895.046 (1g) of the statutes is created to read:

895.046 **(1g)** LEGISLATIVE FINDINGS AND INTENT. The legislature finds that it is in the public interest to clarify product liability law, generally, and the application of the risk contribution theory of liability first announced by the Wisconsin Supreme Court in *Collins v. Eli Lilly Company*, 116 Wis. 2d 166 (1984), specifically, in order to return tort law to its historical, common law roots. This return both protects the rights of citizens to pursue legitimate and timely claims of injury resulting from defective products, and assures that businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago. The legislature finds that the application of risk contribution to former white lead carbonate manufacturers in *Thomas v. Mallet*, 285 Wis. 2d 236 (2005), was an improperly expansive application of the risk contribution theory of liability announced in ***Collins***,

and that application raised substantial questions of deprivation of due process, equal protection, and right to jury trial under the federal and Wisconsin constitutions. The legislature finds that this section protects the right to a remedy found in article I, section 9, of the Wisconsin Constitution, by preserving the narrow and limited application of the risk contribution theory of liability announced in *Collins*.

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895.046 **(2)** APPLICABILITY. This section applies to all actions in law or equity, whenever filed or accrued, in which a claimant alleges that the manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property, including actions based on allegations that the design, manufacture, distribution, sale, or promotion of, or instructions or warnings about, a product caused or contributed to a personal injury or harm to a person or property, a private nuisance, or a public nuisance, and to all related or independent claims, including unjust enrichment, restitution, or indemnification.

SECTION 6. 895.046 (8) of the statutes is created to read:

895.046 **(8)** ABROGATION OF COMMON LAW. This section establishes the elements of and requirements for causation and product identification in and defenses for product liability claims in this state, and supersedes common law doctrines that conflict with the elements, requirements, and defenses established in this section. Except as provided in this subsection, this section does not alter the other elements required to establish a product liability claim or a claim for misrepresentation or breach of warranty under common law.

~~**SECTION 7.** 895.047 (1) (intro.) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:~~

~~895.047 (1) LIABILITY OF MANUFACTURER. (intro.) In an action for damages caused by a manufactured product based on a claim of strict liability, a manufacturer is liable to a claimant if the claimant establishes all of the following by a preponderance of the evidence:~~

~~SECTION 8. 895.047 (2) (a) (intro.) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:~~

~~895.047 (2) (a) (intro.) A seller or distributor of a product is not liable based on a claim of strict liability to a claimant unless the manufacturer would be liable under sub. (1) and any of the following applies:~~

~~SECTION 9. 895.047 (4) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:~~

~~895.047 (4) SUBSEQUENT REMEDIAL MEASURES. In an action for damages caused by a manufactured product based on a claim of strict liability, evidence of remedial measures taken subsequent to the sale of the product is not admissible for the purpose of showing a manufacturing defect in the product, a defect in the design of the product, or a need for a warning or instruction. This subsection does not prohibit the admission of such evidence to show a reasonable alternative design that existed at the time when the product was sold.~~

SECTION ~~10~~ 7. 895.047 (6) of the statutes, as created by 2011 Wisconsin Act 2, is repealed.

SECTION ~~11~~ 8. **Initial applicability.**

(1) The treatment of sections 895.045 (3) (a) and (f), 895.046 (1), (1g), (2), and (8), and 895.047 ~~(1) (intro.), (2) (a) (intro.), (4), and~~ (6) of the statutes first applies to actions or special proceedings pending or commenced on the effective date of this subsection.

(END)

Second Instruction
read from Sen.
Grothman on
1/6/12
JKK

2011 BILL

AN ACT *to repeal* ~~895.045 (3) (f) and~~ 895.047 (6); *to renumber* 895.046 (1); *to amend* ~~895.045 (3) (a),~~ 895.046 (2)~~, 895.047 (1) (intro.), 895.047 (2) (a) (intro.) and 895.047 (4)~~; and *to create* 895.046 (1g) and 895.046 (8) of the statutes; **relating to**: changes to product liability law and the law governing remedies against manufacturers, distributors, sellers, and promoters of a product.

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~~CONTRIBUTORY NEGLIGENCE~~

~~Under Act 2, in product liability actions in which a person injured by a defective product is seeking damages from the manufacturer, distributor, or seller of the product based on a theory of strict liability, the fact finder must first determine what percentage of the causal responsibility for the injury is due to the defective product, what percentage is due to the contributory negligence of the injured party, and what percentage is due to the contributory negligence of any third person. If the injured party's percentage of causal responsibility exceeds the percentage responsibility resulting from the defective condition of the product, the injured party may not recover any damages from the manufacturer, distributor, or seller of the product. If the injured party is entitled to recover damages, the injured party's damages are to be reduced by the injured party's percentage of causal responsibility for the injury, if any.~~

~~This bill specifies that the role of the fact finder in determining the causal responsibility for the injury is not limited to product liability actions based on a theory of strict liability, but instead extends to all product liability actions in which a party injured by a defective product seeks damages.~~

RISK CONTRIBUTION THEORY: REMEDIES AGAINST MANUFACTURERS, DISTRIBUTORS, SELLERS, AND PROMOTERS OF A PRODUCT

Under Act 2, a manufacturer, distributor, seller, or promoter of a product who is a defendant in a civil action generally may be held liable for damages only if an injured party proves, in addition to causation, damages, and other elements of the claim, that the specific product that caused the injury was manufactured, distributed, sold, or promoted by the defendant. Also under Act 2, in cases in which an injured party cannot prove that the defendant manufactured, distributed, sold or promoted the specific product that caused the injury, the defendant may be held liable under risk contribution theory if: 1) the injured party names as defendants in the action those manufacturers who, collectively, during the relevant production period, manufactured at least 80 percent of all products sold in this state that are chemically identical to the specific product that allegedly caused the claimant's injury and 2) the injured party proves certain other elements related to the cause of the injury and the right of the injured party to a recovery. These provisions of Act 2 were made applicable to actions or special proceedings commenced on or after the effective date of the Act.

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The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

~~SECTION 1. 895.045 (3) (a) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:~~

~~895.045 (3) (a) In an action by any person to recover damages for injuries caused by a defective product based on a claim of strict liability, the fact finder shall first determine if the injured party has the right to recover damages. To do so, the fact finder shall determine what percentage of the total causal responsibility for the injury resulted from the contributory negligence of the injured person, what percentage resulted from the defective condition of the product, and what percentage resulted from the contributory negligence of any other person.~~

~~SECTION 2. 895.045 (3) (f) of the statutes, as created by 2011 Wisconsin Act 2, is repealed.~~

SECTION ~~3~~ 1. 895.046 (1) of the statutes, as created by 2011 Wisconsin Act 2, is renumbered 895.046 (1r).

SECTION 4 2. 895.046 (1g) of the statutes is created to read:

895.046 **(1g)** LEGISLATIVE FINDINGS AND INTENT. The legislature finds that it is in the public interest to clarify product liability law, generally, and the application of the risk contribution theory of liability first announced by the Wisconsin Supreme Court in *Collins v. Eli Lilly Company*, 116 Wis. 2d 166 (1984), specifically, in order to return tort law to its historical, common law roots. This return both protects the rights of citizens to pursue legitimate and timely claims of injury resulting from defective products, and assures that businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago. The legislature finds that the application of risk contribution to former white lead carbonate manufacturers in *Thomas v. Mallet*, 285 Wis. 2d 236 (2005), was an improperly expansive application of the risk contribution theory of liability announced in ***Collins***,

and that application raised substantial questions of deprivation of due process, equal protection, and right to jury trial under the federal and Wisconsin constitutions. The legislature finds that this section protects the right to a remedy found in article I, section 9, of the Wisconsin Constitution, by preserving the narrow and limited application of the risk contribution theory of liability announced in *Collins*.

SECTION ~~5~~ 3. 895.046 (2) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.046 **(2)** APPLICABILITY. This section applies to all actions in law or equity, whenever filed or accrued, in which a claimant alleges that the manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property, including actions based on allegations that the design, manufacture, distribution, sale, or promotion of, or instructions or warnings about, a product caused or contributed to a personal injury or harm to a person or property, a private nuisance, or a public nuisance, and to all related or independent claims, including unjust enrichment, restitution, or indemnification.

SECTION ~~6~~ 4. 895.046 (8) of the statutes is created to read:

895.046 **(8)** ABROGATION OF COMMON LAW. This section establishes the elements of and requirements for causation and product identification in and defenses for product liability claims in this state, and supersedes common law doctrines that conflict with the elements, requirements, and defenses established in this section. Except as provided in this subsection, this section does not alter the other elements required to establish a product liability claim or a claim for misrepresentation or breach of warranty under common law.

~~SECTION 7. 895.047 (1) (intro.) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:~~

~~895.047 (1) LIABILITY OF MANUFACTURER. (intro.) In an action for damages caused by a manufactured product based on a claim of strict liability, a manufacturer is liable to a claimant if the claimant establishes all of the following by a preponderance of the evidence:~~

~~SECTION 8. 895.047 (2) (a) (intro.) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:~~

~~895.047 (2) (a) (intro.) A seller or distributor of a product is not liable based on a claim of strict liability to a claimant unless the manufacturer would be liable under sub. (1) and any of the following applies:~~

~~SECTION 9. 895.047 (4) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:~~

~~895.047 (4) SUBSEQUENT REMEDIAL MEASURES. In an action for damages caused by a manufactured product based on a claim of strict liability, evidence of remedial measures taken subsequent to the sale of the product is not admissible for the purpose of showing a manufacturing defect in the product, a defect in the design of the product, or a need for a warning or instruction. This subsection does not prohibit the admission of such evidence to show a reasonable alternative design that existed at the time when the product was sold.~~

SECTION ~~10~~ 5. 895.047 (6) of the statutes, as created by 2011 Wisconsin Act 2, is repealed.

SECTION ~~11~~ 6. **Initial applicability.**

(1) The treatment of sections ~~895.045 (3) (a) and (f),~~ 895.046 (1), (1g), (2), and (8), and 895.047 ~~(1) (intro.), (2) (a) (intro.), (4), and~~ (6) of the statutes first applies to actions or special proceedings pending or commenced on the effective date of this subsection.

(END)

rec'd from Sen. Grothman on 1/6/12 JCK

RESPONSE TO WISCONSIN LEGISLATIVE COUNCIL MEMO RE: CONSTITUTIONALITY OF PROPOSED AMENDMENTS TO 2011 WISCONSIN ACT 2

- The memo's retroactive effect analysis ignores that there is no vested right. The memo opines that a court will "likely" find a retroactive effect under the first step in the analysis. But, the memo ignores that the bill merely restores risk contribution law to its common law (pre-*Thomas*) scope, under which there was no such right. And, *Thomas* misstated Wisconsin law, so there is no "vested" right to risk contribution under *Thomas*.

- The memo misstates the rational basis test. The legislative purpose needs to be "rational" because this is a Due Process test. The memo claims the public purpose must be "substantial," based on *Neiman*—a Wisconsin Supreme Court case from 2000. But in 2010, the Court restored the rationality standard and explained that "substantial" was mistakenly taken from the separate Contracts Clause analysis. *Society Insurance v. Labor & Industrial Review Commission*, 326 Wis.2d 444, 466-67 & n.12 (July 8, 2010).

- The memo cites distinguishable cases applying the balancing test. In all of those cases, the court found the public purpose was too weak to justify the statute's retroactive application. In contrast, the current proposed amendments clearly articulate strong public purposes in restoring the common law and in rejecting *Thomas* that will be sufficient to justify retroactive application. Also, a reviewing court will not apply the incorrect, heightened "substantial" standard used in *Matthies* and *Neiman*.

    - *Society Insurance*: in a 4-3 vote, the Wisconsin Supreme Court found a limited public purpose because there was no statement of legislative intent accompanying the statute and it was unconvinced by the purposes offered during litigation.

    - *Matthies*: the Court acknowledged its public purpose analysis was "speculation" because there was no legislative intent and found that the public purposes claimed in litigation were weak because there was no evidence the legislature considered them and because they were not internally consistent.

    - *Neiman*: the statute did not contain a statement of legislative intent. A majority of the Court found a weak public purpose because it speculated the legislature was merely updating, without rejecting as inadequate, its prior legislation. The dissent speculated that the legislature found the prior legislation inadequate and therefore would have upheld the statute's retroactive effect.

    - The memo does not even attempt to balance the public and private purposes here, nor to apply those cases or their logic.

- The memo does not say the proposed legislation is unconstitutional. It merely says "the retroactive elements of the draft raise significant constitutional concerns." But that is true of many bills and is not a basis for discarding the proposed legislation.

State of Wisconsin
2011 - 2012 LEGISLATURE

LRB-3693/2 3
TKK:jld/kjf/med:jm

d-note insert

2011 BILL

1/9/12 wanted 1/10/12 A-M. (asap but pending receipt of jacket)

Regen

AN ACT ***to repeal*** 895.045 (3) (f) and 895.047 (6); ***to renumber*** 895.046 (1); ***to amend*** 895.045 (3) (a), 895.046 (2), 895.047 (1) (intro.), 895.047 (2) (a) (intro.) and 895.047 (4); and ***to create*** 895.046 (1g) and 895.046 (8) of the statutes; **relating to:** changes to product liability law and the law governing remedies against manufacturers, distributors, sellers, and promoters of a product.

Analysis by the Legislative Reference Bureau

2011 Wisconsin Act 2 (Act 2) made a number of changes to the law governing civil actions involving product liability claims brought under a theory of strict liability and to civil actions against manufacturers, distributors, sellers, and promoters of products. This bill makes several changes to certain provisions enacted under Act 2.

PRODUCT LIABILITY

REQUIREMENTS FOR BRINGING A PRODUCT LIABILITY ACTION BASED ON A DEFECTIVE PRODUCT; DEFENSES AND EXCEPTIONS TO LIABILITY

Insert Analysis ✓

Act 2 created specific requirements for bringing a product liability action seeking damages under the theory of strict liability against manufacturers of the product and against sellers and distributors of the product. Act 2 included defenses and exceptions to strict liability for these types of parties. This bill provides that the requirements established under Act 2 for ~~bringing a~~ product liability action seeking damages, and the defenses and exceptions to liability, apply not only to product

liability actions brought under a theory of strict liability but instead extend to all product liability actions in which a party injured by a defective product seeks damages.

CONTRIBUTORY NEGLIGENCE

Under Act 2, in product liability actions in which a person injured by a defective product is seeking damages from the manufacturer, distributor, or seller of the product based on a theory of strict liability, the fact finder must first determine what percentage of the causal responsibility for the injury is due to the defective product, what percentage is due to the contributory negligence of the injured party, and what percentage is due to the contributory negligence of any third person. If the injured party's percentage of causal responsibility exceeds the percentage responsibility resulting from the defective condition of the product, the injured party may not recover any damages from the manufacturer, distributor, or seller of the product. If the injured party is entitled to recover damages, the injured party's damages are to be reduced by the injured party's percentage of causal responsibility for the injury, if any.

This bill specifies that the role of the fact finder in determining the causal responsibility for the injury is not limited to product liability actions based on a theory of strict liability, but instead extends to all product liability actions in which a party injured by a defective product seeks damages.

RISK CONTRIBUTION THEORY: REMEDIES AGAINST MANUFACTURERS, DISTRIBUTORS, SELLERS, AND PROMOTERS OF A PRODUCT

Under Act 2, a manufacturer, distributor, seller, or promoter of a product who is a defendant in a civil action generally may be held liable for damages only if an injured party proves, in addition to causation, damages, and other elements of the claim, that the specific product that caused the injury was manufactured, distributed, sold, or promoted by the defendant. Also under Act 2, in cases in which an injured party cannot prove that the defendant manufactured, distributed, sold or promoted the specific product that caused the injury, the defendant may be held liable under risk contribution theory if: 1) the injured party names as defendants in the action those manufacturers who, collectively, during the relevant production period, manufactured at least 80 percent of all products sold in this state that are chemically identical to the specific product that allegedly caused the claimant's injury and 2) the injured party proves certain other elements related to the cause of the injury and the right of the injured party to a recovery. These provisions of Act 2 were made applicable to actions or special proceedings commenced on or after the effective date of the Act.

This bill provides that the provisions of Act 2 governing remedies against manufacturers, distributors, sellers, and promoters of a product apply to all actions in law or equity, whenever filed or accrued. The bill includes a statement of legislative findings and intent which states, in part, that the portions of Act 2 governing remedies against manufacturers, distributors, sellers, and promoters of a product under risk contribution theory were enacted in response to the Wisconsin Supreme Court's decision in *Thomas v. Mallett*, 2005 WI 129. The bill also explicitly

abrogates common law doctrines governing product liability claims that conflict with the elements, requirements, and defenses established under Act 2.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 895.045 (3) (a) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.045 **(3)** (a) In an action by any person to recover damages for injuries caused by a defective product ~~based on a claim of strict liability~~, the fact finder shall first determine if the injured party has the right to recover damages. To do so, the fact finder shall determine what percentage of the total causal responsibility for the injury resulted from the contributory negligence of the injured person, what percentage resulted from the defective condition of the product, and what percentage resulted from the contributory negligence of any other person.

SECTION 2. 895.045 (3) (f) of the statutes, as created by 2011 Wisconsin Act 2, is repealed.

SECTION 3. 895.046 (1) of the statutes, as created by 2011 Wisconsin Act 2, is renumbered 895.046 (1r).

SECTION 4. 895.046 (1g) of the statutes is created to read:

895.046 **(1g)** LEGISLATIVE FINDINGS AND INTENT. The legislature finds that it is in the public interest to clarify product liability law, generally, and the application of the risk contribution theory of liability first announced by the Wisconsin Supreme Court in *Collins v. Eli Lilly Company*, 116 Wis. 2d 166 (1984), specifically, in order to return tort law to its historical, common law roots. This return both protects the rights of citizens to pursue legitimate and timely claims of injury resulting from defective products, and assures that businesses may conduct activities in this state

without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago. The legislature finds that the application of risk contribution to former white lead carbonate manufacturers in *Thomas v. Mallet*, 285 Wis. 2d 236 (2005), was an improperly expansive application of the risk contribution theory of liability announced in Collins, and that application raised substantial questions of deprivation of due process, equal protection, and right to jury trial under the federal and Wisconsin constitutions. The legislature finds that this section protects the right to a remedy found in article I, section 9, of the Wisconsin Constitution, by preserving the narrow and limited application of the risk contribution theory of liability announced in *Collins*.

SECTION 5. 895.046 (2) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.046 **(2)** APPLICABILITY. This section applies to all actions in law or equity, whenever filed or accrued, in which a claimant alleges that the manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property, including actions based on allegations that the design, manufacture, distribution, sale, or promotion of, or instructions or warnings about, a product caused or contributed to a personal injury or harm to a person or property, a private nuisance, or a public nuisance, and to all related or independent claims, including unjust enrichment, restitution, or indemnification.

SECTION 6. 895.046 (8) of the statutes is created to read:

895.046 **(8)** ABROGATION OF COMMON LAW. This section establishes the elements of and requirements for causation and product identification in and defenses for product liability claims in this state, and supersedes common law doctrines that

conflict with the elements, requirements, and defenses established in this section. Except as provided in this subsection, this section does not alter the other elements required to establish a product liability claim or a claim for misrepresentation or breach of warranty under common law.

SECTION 7. 895.047 (1) (intro.) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.047 **(1)** LIABILITY OF MANUFACTURER. (intro.) In an action for damages caused by a manufactured product ~~based on a claim of strict liability~~, a manufacturer is liable to a claimant if the claimant establishes all of the following by a preponderance of the evidence:

SECTION 8. 895.047 (2) (a) (intro.) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.047 **(2)** (a) (intro.) A seller or distributor of a product is not liable ~~based on a claim of strict liability~~ to a claimant unless the manufacturer would be liable under sub. (1) and any of the following applies:

SECTION 9. 895.047 (4) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

895.047 **(4)** SUBSEQUENT REMEDIAL MEASURES. In an action for damages caused by a manufactured product ~~based on a claim of strict liability~~, evidence of remedial measures taken subsequent to the sale of the product is not admissible for the purpose of showing a manufacturing defect in the product, a defect in the design of the product, or a need for a warning or instruction. This subsection does not prohibit the admission of such evidence to show a reasonable alternative design that existed at the time when the product was sold.

SECTION 10. 895.047 (6) of the statutes, as created by 2011 Wisconsin Act 2, is repealed.

SECTION 11. Initial applicability.

(1) The treatment of sections 895.045 (3) (a) and (f), 895.046 (1), (1g), (2), and (8), and 895.047 (1) (intro.), (2) (a) (intro.), (4), and (6) of the statutes first applies to actions or special proceedings pending or commenced on the effective date of this subsection.

(END)

D-note

Insert analysis

Finally, Act 2 included an inapplicability provision making the requirements for bringing a product liability action seeking damages under a theory of strict liability, the exceptions to strict liability, and the defenses to strict liability inapplicable to actions based on a claim of negligence or breach of warranty. This bill eliminates the inapplicability provision.

(end ins analysis)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3693/1dn
TKK:jld/kjf/med:md

date

Senator Grothman:

You have provided drafting instructions to revise LRB-3693/2. The drafting instructions consist of a marked-up 2011 BILL that resembles LRB-3693/2. On that marked-up bill, you have directed me to eliminate from the LRB-3693/2 the amendment of ss. 895.047 (1) (intro.), 895.047 (2) (a) (intro.), and 895.047 (4), but to retain the repeal of s. 895.047 (6). Finally, you have proposed an amendment to the analysis that reads as follows:

> "This bill provides that the defenses and time limit ~~requirements~~ established under Act 2 for ~~brining a~~ product liability ~~action~~ actions ~~seeking damages, and the defenses and exceptions to liability,~~ apply not only to product liability actions brought under a theory of strict liability but instead extend to all product liability actions in which a party injured by a defective product seeks damages."

I do not believe that the changes to s. 895.047, as proposed in the marked-up 2011 BILL, accomplish the change indicated in the excerpt of the analysis, above.

As stated in the analysis to LRB-3693/2, 2011 Wisconsin Act 2 created specific requirements for bringing a product liability action seeking damages caused by a manufactured product under a theory of strict liability against manufacturers of the product and against sellers and distributors of the product. Act 2 included exceptions to strict liability for these types of parties when the product liability actions are brought under s. 895.047. Act 2 also provided for defenses available to certain defendants; the defenses are established under current law, s. 895.047 (3). Finally, s. 895.047 (6), as created by Act 2, makes the provisions governing actions seeking damages caused by defective products inapplicable to actions based on a claim of negligence or breach of warranty.

Although you propose to repeal s. 895.047 (6), I don't believe the plain language of s. 895.047 would permit any subsection of s. 895.047 to apply to actions based on a claim of negligence or breach of warranty. Sections 895.047 (1), (2), and (4) refer explicitly to actions brought under a theory of strict liability, and s. 895.047 (5) references "any action brought under this section..." That is, the only actions available under s. 895.047 are product liability actions brought under a theory of strict liability.

Section 895.047 (3), which bears the title "**Defenses.**," must be read in the context of the remainder of s. 895.047. Under current law, s. 895.047 (3) permits a defendant

manufacturer, seller, or distributor of a product to raise certain defenses in actions brought under s. 895.047 (1) or (2); these subsections are, by their terms, limited to product liability actions brought under a theory of strict liability. As I read s. 895.047 as a whole, I don't believe repealing s. 895.047 (6) would make the defenses described in s. 895.047 (3) applicable to "all product liability actions in which a party injured by a defective product seeks damages" as you suggest in your proposed analysis. For that reason, I did not include that statement in the analysis for this draft.

Please let me know if you have any questions or wish to discuss this further, or would like me to make any changes to this draft.

Tracy K. Kuczenski
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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3693/3dn
TKK:jld/kjf/med:jf

January 9, 2012

Senator Grothman:

You have provided drafting instructions to revise LRB-3693/2. The drafting instructions consist of a marked-up 2011 BILL that resembles LRB-3693/2. On that marked-up bill, you have directed me to eliminate from the LRB-3693/2 the amendment of s. 895.047 (1) (intro.), (2) (a) (intro.), and (4), but to retain the repeal of s. 895.047 (6). Finally, you have proposed an amendment to the analysis that reads as follows:

> "This bill provides that the defenses and time limit ~~requirements~~ established under Act 2 for ~~brining a~~ product liability ~~action~~ actions ~~seeking damages, and the defenses and exceptions to liability,~~ apply not only to product liability actions brought under a theory of strict liability but instead extend to all product liability actions in which a party injured by a defective product seeks damages."

I do not believe that the changes to s. 895.047, as proposed in the marked-up 2011 BILL, accomplish the change indicated in the excerpt of the analysis, above.

As stated in the analysis to LRB-3693/2, 2011 Wisconsin Act 2 (Act 2) created specific requirements for bringing a product liability action seeking damages caused by a manufactured product under a theory of strict liability against manufacturers of the product and against sellers and distributors of the product. Act 2 included exceptions to strict liability for these types of parties when the product liability actions are brought under s. 895.047. Act 2 also provided for defenses available to certain defendants; the defenses are established under current law, s. 895.047 (3). Finally, s. 895.047 (6), as created by Act 2, makes the provisions governing actions seeking damages caused by defective products and based on a theory of strict liability inapplicable to actions based on a claim of negligence or breach of warranty.

Although you propose to repeal s. 895.047 (6), I don't believe the plain language of s. 895.047 would permit any subsection of s. 895.047 to apply to actions based on a claim of negligence or breach of warranty. Section 895.047 (1), (2), and (4) refer explicitly to actions brought under a theory of strict liability, and s. 895.047 (5) references "any action brought under this section..." That is, the only actions available under s. 895.047 are product liability actions brought under a theory of strict liability.

Section 895.047 (3), which bears the title "**Defenses.**," must be read in the context of the remainder of s. 895.047. Under current law, s. 895.047 (3) permits a defendant

manufacturer, seller, or distributor of a product to raise certain defenses in actions brought under s. 895.047 (1) or (2); these subsections are, by their terms, limited to product liability actions brought under a theory of strict liability. As I read s. 895.047 as a whole, I don't believe repealing s. 895.047 (6) would make the defenses described in s. 895.047 (3) applicable to "all product liability actions in which a party injured by a defective product seeks damages" as you suggest in your proposed analysis. For that reason, I did not include that statement in the analysis for this draft.

Please let me know if you have any questions, wish to discuss this further, or would like me to make any changes to this draft.

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Godwin, Gigi

From: Godwin, Gigi
Sent: Monday, January 09, 2012 11:54 AM
To: Burri, Lance
Subject: RE: JACKET REQUEST for: LRB 11-3693/3 Topic: Changes to product liability provisions governing manufacturers, distributors, sellers and promoters of products

Hello Lance. 11-3693/3 was jacketed around 10:15am. A Senate page was here for pick-up about 15 minutes ago, so the jacket should be on its way to you. Thanks, Gigi

Gigi Godwin, Program Assistant
State of Wisconsin - Legislative Reference Bureau
1 East Main Street, Suite 200
Madison, WI 53703
(608) 266-3561
Gigi.Godwin@legis.wisconsin.gov

From: Burri, Lance
Sent: Monday, January 09, 2012 11:47 AM
To: LRB.Legal
Subject: Draft Review: LRB 11-3693/3 Topic: Changes to product liability provisions governing manufacturers, distributors, sellers and promoters of products

Please Jacket LRB 11-3693/3 for the SENATE.